IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD.

CRIMINAL APPEAL NO.656 OF 2001

Pandurang Changu Mohite]
Prisoner No. C-]
Yervada Central Prison,] Appellant/
Pune-411 006] ori.accused.

versus

The State of Maharashtra] Respondent

Ms. D.M. Shah, Advocate (appointed) for appellant.
Mrs. V.R.Bhosle, APP, for the Respondent - State.

CORAM : N. V. DABHOLKAR AND SMT.V.K.TAHILRAMANI,JJ.

DATE: FEBRUARY 6, 2006

ORAL JUDGMENT : (PER DABHOLKAR, J.)

1. This is an appeal under Section 374(2) of the Code of Criminal Procedure, 1973, challenging the judgment and order dated 8.8.2000, delivered by Additional Sessions Judge, Greater Bombay, Bombay, in Sessions Case No. 50 of 1991. By the impugned order, the appellant is held guilty for offence punishable under Section 302 of Indian Penal Code. He is, therefore, convicted and sentenced to life imprisonment, fine Rs.1000/=, in default, to suffer rigorous imprisonment for one month. Being aggrieved by the said conviction and sentence, present appeal under Section 374(2) of the Code.

2. The incident in question took place on 22.10.1990 and the victim of the incident, namely, Subhash was brother of the present appellant-accused. The complainant Chhaya is widow of Subhash, and criminal law was set into motion, on the basis of complaint (Exhibit 6) filed by Chhaya (PW-1).

. In fact, at the material time, accused, deceased and the families were staying in one room, although they were separated in residence and mess. Parents of the accused and the deceased were also family members. The deceased and the complainant Chhaya used to run a tea-stall from a location, just in front of residential room. They also used to sell **Vada Pav**. Business hours were during entire day i.e. since about 6.00 a.m. to 9.00 p.m.

. One Anant Pawar is said to be residing in the said locality, in fact, without having any premises. He is said to be residing in the locality, because he used to lay his bed at night hours near the tea-stall of the deceased and the complainant.

. On the alleged day, the accused objected the said Anant Pawar from laying his bed near the tea-stall of the deceased. Anant Pawar informed this to the

deceased, whereupon the deceased took up the quarrel with the accused. It appears that the quarrel changed into scuffle. A neighbour informed the complainant Chhaya and hence, she came out from the residence. As she closed the gap between the residence and place of occurrence, she noticed that the accused was throwing stones towards the deceased and as a result of one stone blow on the head, deceased Subhash suffered bleeding injury and he collapsed on the spot and became unconscious.

. The victim was carried to KEM hospital by the complainant and Raju Meshram (PW-5). He was declared dead at about 2.00 p.m. Next day, i.e. 23.10.1990, police had approached KEM hospital and taken Chhaya to Rafi Ahmed Kidwai Marg Police Station and her narration was recorded as complaint (Exh. 6).

3. Apart from complainant Chhaya (PW-1), prosecution examined Popat Torne (PW-2), Shaikh Yusuf (PW-3) and Raju Meshram (PW-5) as eye witnesses. Popat Torne, although supported the prosecution story during the course of his chief examination, he clearly showed signs of hostility towards the prosecution, during course of cross examination. Shaikh Yusuf (PW-3) and Raju Meshram (PW-5) have lent support to the prosecution case, to the fullest possible extent. Raju Meshram

confirmed that he took the victim to KEM hospital in taxi at about 8.30 P.M.

. Remaining three witnesses are persons, who contributed to the investigation. In fact, investigation was carried out by Shri Narayan Ingle, Additional Superintendent of Police (PW-6). Dr. Harshwardhan Bakshi, Medical Officer, then attached to KEM Hospital (PW-7) had performed autopsy and post mortem report is at Exh. 16. Remaining witness, Madhukar Gamre (PW-4) is the panch witness to the scene of occurrence. He has turned hostile to the prosecution.

4. On reference to statement under Section 313 of the Code of Criminal Procedure, 1973, it is evident that the accused has not disputed his relationship with the deceased. He has also admitted that the families were residing together in a common hut. He also admits that Anant Pawar used to sleep near the tea-stall of deceased and Chhaya and that he had objected and, therefore, quarrel took place between him, Subhash and Anant. Thus, having accepted practically the entire background of the incident, accused only disptued the manner in which it took place. In fact, in response to question No.9, he has also admitted that Subhash was taken to hospital by a taxi, by PW-5 Raju, and that Subhash died

on the next day. Yet, accused claimed that, the complaint filed against him is false one. He denied that, he hurled any stone aimed at the victim. In fact, accused has also admitted that Popat (PW-2) and Shaikh Yusuf (PW-3) are his neighbours. It may not be inappropriate to say that the accused admits all other background of the incident, except the injury suffered by the victim to which, his brother Subhash succumbed to death, and his being author of the injury.

. In fact, the appointed Counsel Ms. Shah found herself, to some extent, handicapped, because no concrete defence is raised by her counterpart in the trial court, except denial which has become very much brittle because of response of the accused, during his statement under Section 313 of the Code of Criminal Procedure.

5. Heard Ms. D.S. Shah, learned Counsel for the appellant and Smt. V.R. Bhosle, learned APP for Respondent-State.

. Learned Counsel appointed for the appellant has taken us through evidence of all the eye witnesses i.e. the complainant, PW-2 Popat, PW-3 Sk. Yusuf and PW-5 Raju Meshram. She has also taken us through part of the judgment and has tried to impress upon us that the

prosecution story is unworthy of belief. As a second line of argument, she has relied upon the contents of complaint (Exh.6) and urged that the complaint, even if accepted as it is; provides that the victim was assailed, there was hot exchange, followed by free fight between the brothers, during which the accused pelted stone towards the victim, which resulted into head injury and death of Subhash. According to Ms. Shah, the fact-situation, as propounded by the prosecution, even if accepted as it is; there is room to believe that the accused did not intend to cause death, he did not intend to inflict such bodily injury, which, in all probability, was likely to result into death, in the ordinary course of nature. She, therefore, urged that it may be treated an offence under Section 304 (II) of Indian Penal Code and the appellant, thereafter, may be dealt with utmost leniency.

. Learned APP Smt. Bhosle has supported the judgment of the trial court for the same reasons as recorded by trial court, and also opposed prayer for reduction of finding of guilty to one under Section 304 (II) and also reduction of sentence.

6. On going through the judgment of the trial court, it can be seen that the learned trial judge has enlisted undisputed/admitted facts in paragraphs 12 and

13 of his judgment. Since the medical evidence was not under challenge, death is held to be homicidal. For the reasons discussed in paragraphs 15 and 16, the trial court found the complainant Chhaya and PW-3 Shaikh Yusuf, to be reliable. It is also observed that Shaikh Yusuf is admittedly a neighbour and yet uninterested witness, so far as quarrel between the two brothers is concerned. Observing that the evidence of prosecution witness Nos. 1,2,3 and 5 is complementing each other and provides direct account of the incident, which is sufficient to hold accused/appellant responsible for head injury suffered by deceased Subhash, the trial court has recorded a finding of guilty.

. So far as medical evidence is concerned, although Dr. Karale, who had performed post mortem, was not available to depose, because he had left the services and his whereabouts at the time of recording evidence, were unknown, learned trial judge has read the post mortem notes in evidence, by relying upon sections 293 and 294 of the Code of Criminal Procedure, as also section 35 of Evidence Act, and ratio laid down in the matters of **Shaikh Farid Hussainsab v. State of Maharashtra, 1983, Cri.L.J. 487 and Saddiq v. State (FB) 1981 Cri.L.J.379**.

. So far as defence of the accused, which has, at

times, peeped through cross examination of eye witnesses, that deceased Subhash was drunk at the time of alleged incident, is concerned, the same is repelled, in view of observations in the post mortem notes that there were no traces of liquor in the stomach or intestine. Non-examination of Anant, according to learned trial judge, was not fatal to the prosecution case. According to learned judge, location of the injury also ruled out any possibility of injury being result of dash or brushing with hard and rough object like a stone-wall and, therefore, suggestion of the defence to that effect, was found unacceptable.

7. Ms Shah, learned Counsel for the appellant, was justified in submitting that PW-2 Popat, although claimed to be an eye witness during his chief examination and supported the prosecution, is a witness to be believed only after due caution. On the contrary, his cross examination indicated that he may not be the eye witness, but he has posed himself as an eye witness on the basis of details learnt by him from others. We quote a small extract from his cross examination;

> " I was not on the spot when dispute started between accused and Subhash. It is true that I saw deceased in injured condition, when I went to the spot. It is true that, when I went to

the spot, quarrel was over. "

By these three admissions, Popat has given enough indication that he has not actually witnessed violence and probably, during the chief-examination, he was tempted to speak on the basis of knowledge gathered by him from others, as his personal knowledge.

. On considering evidence of complainant Chhaya and that of PW-3 Shaikh Yusuf and the cross examination, to which these witnesses are subjected, we are unable to agree with Ms Shah that they are unworthy of belief. In fact, on reference to evidence of PW-3 Shaikh Yusuf and PW-5 Raju Meshram, we find that they are not tempted even to exaggerate. PW Raju claimed that while he was having his meals inside the house, he heard commotion and hence, he rushed towards the spot and by the time he reached the location, Subhash had already collapsed. Raju had avoided temptation of claiming to be an eye witness of the vital blow. He has not denied normal vices of the victim and others. He admits that, deceased Subhash used to consume liquor; that the accused used to go to ration shop at night and Subhash used to reside at the residence, because of paucity of accommodation, in relation to family members.

. Even if for the sake of argument, we presume

that since the complainant Chhaya claimed that she was inside the house and she rushed towards the location only after hearing about quarrel between her husband and the accused and, therefore, she may not be an eye witness to actual violence, we are of considered view that the evidence of Raju Meshram, coupled with admitted position, as reflected from answers by accused to question Nos. 2,3,4,5,9,10,13 and 16 during the course of his statement under Section 313 of Code of Criminal Procedure, 1973, is sufficient to draw an inference that it was the accused, who hurled stone towards Subhash and caused head injury to Subhash, which ultimately proved to be fatal. We have also recorded that in spite of going through cross examination of Chhaya and Shaikh Yusuf, we are not able to persuade ourselves to consider a possibility that they may not be eye witnsses and they are giving false account.

. The trial court, therefore, does not appear to have committed any error in arriving at a conclusion that, the accused was the author of head injury sustained by the victim, suffered by a pelted stone. We are, therefore, not inclined to record a clean acquittal.

8. However, the second line of argument of Advocate Ms. Shah for the appellant, cannot lightly be brushed

aside. The way replies during statement under Section 313 of the Code of Criminal Procedure have considerably helped the prosecution, the contents in complaint (Exh.6) have considerably helped the defence, in this alternate submission. We quote contents from complaint Exh. 6, for ready reference.

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i.e. " Within a short time, a fight erupted between the two, they started hurling stones towards each other. Seeing that, I went to the location, where my husband (deceased) and his brother were quarrelling. I saw blood oozing from the mouth of my husband. During fight, my brother-in-law Pandurang Mohite took up a stone and hurled-hit the same to Subhash Mohite, on

his head. Being struck by the stone, my husband Subhash Mohite cried loudly and collapsed unconscious. "

. Following details, which are undisputed, need to be taken into account while considering the second submission of Ms. Shah, learned Counsel for the appellant. The manner in which the quarrel took place, is within the contents of the complaint reproduced hereinabove. Admittedly, the deceased and accused are brothers. The two brothers, their wives, their children and their parents, had only one room accommodation. There was paucity of accommodation and hence, accused used to go and sleep at the ration shop at the night. But, there is no narration of any earlier bickering, heartburning, much less strained relationship, or enmity. Admittedly, Anant Pawar is resident of locality, who used to sleep by the side of tea-stall of the victim and Chhaya, by laying his bed there. There is no dispute that the quarrel started from the point of this accommodation of Anant Pawar, by the deceased Subhash. Accused challenged Anant Pawar, who, in turn, informed objection of the accused to deceased Subhash. Thereupon, Subhash took an exception to the objection raised by accused-brother. It is in this fashion, quarrel erupted and the manner in which it erupted, is not disputed. What happened thereafter, has come in the

complaint, and we must say that in the deposition, Chhaya has modified her narration of the incident, to some extent. In the complaint, it is her story that, there was a fight between the two brothers during which both of them hurled stones towards each other. From the witness box, she converted the same to be one sided affair and this is a part of vital importance, supporting second line of argument, on behalf of the appellant. Even as per the say of the accused, although Anant Pawar was present, he was bound to be on the side of the victim and, therefore, there is no chance of Anant Pawar hurling any stone at the victim. Fight being between accused on one side and the victim and Anant Pawar on the other, any injury suffered by victim, would be result of assault by the accused.

. However, as can be seen from the complaint, there was no past enmity, there was no pre meditation. The quarrel erupted, because the victim approached the accused to challenge his action of objecting Anant Pawar laying his bed near the tea-stall of the deceased and when we refer to complaint, it was a bilateral affair, during which accused, as well as victim, freely hurled stones at each other. If this situation is taken into account, as rightly argued by Ms. Shah, learned Counsel for the appellant, there is a room to consider a possibility of absence of any intentions to kill, or

intentions to cause such bodily injuries, which, in the ordinary course of nature, ought to result into death. We are, therefore, inclined to accept second argument of Advocate for the appellant. We hold the appellant guilty for offence punishable under Section 304 (II) of Indian Penal Code, in stead of Section 302, because of possibility that vital injury and death were neither intended, nor anticipated. The appeal, therefore, partly succeeds. Hence, the following order.

9. The appeal is partly allowed. The judgment and order dated 8/8/2000, delivered by Additional Sessions Judge, Greater Bombay, Bombay, in Sessions Case No.50 of 1991, is quashed and set aside, to the extent it holds the appellant Pandurang Changu Mohite guilty for offence punishable under Section 302 of Indian Penal Code, and sentences him to life imprisonment and fine on that count.

. In stead, we hold the appellant - accused Pandurang Changu Mohite, guilty for the offence punishable under Section 304 (II) of Indian Penal Code and consequently, sentence him to rigorous imprisonment for seven years and fine Rs.1000/-, in default, rigorous imprisonment for one month. He shall be entitled to set off under Section 428 of of Code of Criminal Procedure, 1973, equivalent to period of detention, during pendency

of investigation, trial and this appeal.

. Registrar (Judicial) shall ensure supply of a certified copy of this judgement, free of cost, to the prisoner in person, through prison authorities, in addition to Writ, regarding modification of finding and sentence, that will be forwarded to the prison authorities.

. With conclusion of appeal, assignment of Advocate Ms.D.M. Shah comes to an end. We quantify her professional charges at Rs.2500/-.

(V.K.TAHILRAMANI,J.) (N.V.DABHOLKAR,J.)

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